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No. 11

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL TRADE COMMISSION, PETITIONER

v.

MINNEAPOLIS-HONEYWELL REGULATOR COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above-entitled cause on September 18, 1951.

OPINION BELOW

The opinion of the court of appeals (R. 2308-2315) is reported at 191 F. 2d 786.

JURISDICTION

The final decree of the court of appeals was entered on September 18, 1951 (R. 2316-2319). The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1254(1).

QUESTIONS PRESENTED

1. Whether, in a proceeding under Section 2(a) of the Clayton Act involving injury to competition among a seller's customers resulting from the seller's discriminatory pricing practices, a finding of such injury to competition is adequately supported by evidence showing that substantial price differentials have been given to customers competing with each other, or whether it is also necessary to prove that particular customers have in fact been adversely affected by the discriminatory prices.

2. Whether under *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474, a reviewing court is justified in setting aside findings of fact by an administrative agency because of the reviewing court's conclusion that contrary findings recommended by the trial examiner have substantial evidentiary support which outweighs the facts relied on by the Commission.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13, provides in part:

> (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where

such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

STATEMENT

This petition seeks review of the portion of a judgment of the Court of Appeals for the Seventh Circuit which reversed a part of an order of the Federal Trade Commission directing respondent to cease and desist from violating Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13). The Commission's order, issued January 14, 1948, after extended hearings, comprised three parts. Part III, the portion presently involved, dealt with price discriminations resulting from respondent's quantity discount pricing system.[1]

The facts relating to respondent's business, as found by the Commission and accepted by the court below (R. 2309-2311), are as follows:

Respondent is one of the country's principal manufacturers of automatic temperature controls (R. 2241). These controls, constituting an important item in oil burners, are sold by respondent to manufacturers of such burners, and to wholesalers, contractors and dealers in burners and automatic temperature controls (*ibid.*). The controls generally are sold in sets of three (R. 2242), and a set constitutes the principal cost item of the burner—

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[1] Parts I and II, dealt, respectively, with unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, and exclusive dealing contracts in violation of Section 3 of the Clayton Act. Although respondent's petition to review attacked all three parts of the order (R. 2284-98), respondent abandoned its challenge to parts I and II during the proceedings in the court below (R. 2308). The court of appeals affirmed and enforced Parts I and II (R. 2317-2318).

often as high as 40% of the total cost (R. 2252). From 1939 to 1941, respondent sold approximately 60% of all automatic controls sold in the United States (R. 2241). As a result of substantial advertising expenditures, respondent has developed a large public demand for its controls, and burners equipped with them frequently have been sold for $2.50 to $5.00 more than the same burners equipped with controls made by respondent's competitors (R. 2242).

During the period 1937 to 1941 respondent followed a standard quantity discount pricing system (R. 2250-52). Discounts from published list prices were given to all purchasers of 50 or more sets of controls annually (2250). The net prices decreased as the quantities purchased increased. During 1941 respondent had seven different quantity price brackets. Prices varied from $17.35 per set in the lowest volume bracket (50-349 sets) to $13.75 per set for the largest purchasers (10,000-up) (R. 2252).

At the beginning of each year respondent generally entered into annual contracts covering customer requirements (R. 2243, 2253). The specified quantity, upon which the price was determined, was based upon the customer's past requirements (R. 2253). If a customer failed to purchase the specified quantity, the price was not increased to the higher level which would have been required to comply with the standard discount scale (*Ibid.*). On the other hand, if total purchases exceeded the

contract figure so as to bring the purchaser into a lower price range, he received such lower price, by retroactive discounts or otherwise (*ibid.*) This system was known as "off-scale" pricing (R. 2254).

On the basis of the foregoing facts, the Commission found, contrary to the conclusion of the trial examiner (R. 2202), that the price differentials substantially injured competition between respondent and its competitors, and among its customers, (R. 2256, 2260). It further found, on the basis of a cost accounting study made by respondent, that the differentials were justified by cost differentials only in the four highest price brackets, covering less than 45% of respondent's total sales (R. 2254), and that the differentials in the three lowest price brackets, as well as the "off-scale" prices, were justified neither by cost differentials nor were made in good faith to meet an equally low price of a competitor (R. 2257-60). The Commission accordingly directed respondent to cease and desist from—

> selling such controls to some oil-burner manufacturers at prices materially different from the prices charged other oil-burner manufacturers who in fact compete in the sale and distribution of such furnace controls, when the differences in prices are not justified by differences in the cost of manufacture, sale, or delivery resulting from differing methods or

quantities in which such products are sold or delivered [R. 2264].

On respondent's petition to review the Commission's order, the court of appeals held that the Commission's findings that respondent's practices had substantially lessened or prevented competition between it and its competitors, or among its customers, were not supported by substantial evidence. (R. 2315.) The court accordingly did not reach the question whether the discriminations had been made in good faith to meet an equally low price of a competitor.

The court, in rejecting the Commission's findings as to injury to *customer* competition, relied upon evidence that in many instances there appeared to be no direct correlation between the size of the discount on the controls and the price at which burners were sold by the purchasers of the controls, and that one manufacturer, although in the highest price bracket, had been able to undersell all competitors because of production economies (R. 2313-2315). The court also pointed to the fact that the cost of controls was only one element in the over-all cost of the burners (R. 2315). In overturning the Commission's findings as to injury to *competitor* competition, the court relied on evidence that the business of respondent's competitors had increased during the period involved (R. 2312). The court stated that such facts "fully establish the examiner's finding

that competitor competition was not injured", and concluded that when the examiner's findings "are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary" (*ibid.*).

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred—

(1) In holding that proof of injury to customer competition required a showing of causal relationship between the seller's discriminatory prices and its customers' prices, and in failing to hold that a finding of injury to customer competition was adequately supported by evidence that substantial price discriminations were given by the seller among customers who were competing with each other.

(2) In holding that the Commission acted arbitrarily in rejecting the trial examiner's recommended findings, and that an Examiner's findings which the reviewing court believes to be supported by the preponderance of the evidence are binding upon the Commission.

(3) In holding that the Commission erred in finding that the effect of respondent's quantity discount pricing system was substantially to lessen or to prevent competition between respondent and its competitors, or among its customers.

(4) In substituting its judgment for that of the Commission as to the effects upon competition of respondent's quantity discount pricing system.

(5) In reversing part III of the Commission's order and dismissing Count III of the Commission's complaint.

REASONS FOR GRANTING THE WRIT

1. The rationale of the decision by the court below on injury to *customer* competition was its determination that no actual injury to such competition had been shown. In reaching this conclusion the court applied an unduly restrictive standard of injury to competition—actual injury rather than a reasonable possibility thereof—directly contrary to the interpretation which this Court placed upon Section 2(a) in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37.[2]

In the *Morton Salt* case, the Court had before it a standard quantity discount system similar to that of respondent. The Commission had held that such a system violated Section 2(a) of the Act in that it injured competition among customers. The company contended, *inter alia*, that the findings failed to show that the discriminatory discounts had in fact injured competition, and that the evidence was insufficient to support the findings.

In rejecting the first contention, this Court pointed out that, although there were specific findings that injury to competition had resulted from the discounts, "the statute does not require the

[2] The test applied also is narrower than the "reasonable probability" test approved in the dissenting opinion of Mr. Justice Jackson (334 U. S. at 56).

Commission to find that injury has actually resulted" (p. 46). The Court said (pp. 46-47):

> The statute requires no more than that the effect of the prohibited price discriminations "may be substantially to lessen competition * * * or to injure, destroy, or prevent competition." After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." *Corn Products Co.* v. *Federal Trade Comm'n*, 324 U.S. 726, 742. Here the Commission found *what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.* [Italics added]

In holding that the findings were supported by the evidence, the Court first noted the testimony of many witnesses "that they had suffered actual financial losses on account of respondent's discriminatory prices." It went beyond this, however, and pointed out that such evidence was unnecessary. The Court stated (pp. 50-51):

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected

> by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.

Thus, under *Morton Salt* all that is needed to support a finding of injury to customer competition under Section 2(a) is a showing that discriminatory prices have been given to customers competing with each other, and that such discriminations were substantial. As *Morton Salt* makes clear, such discriminations perforce injure competition. This rule reflects the Congressional determination that it was an "evil" that a large buyer could secure a "competitive advantage" over a smaller buyer "solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price." 334 U.S. 37, 43.

Although in the present case the Commission found that there had been substantial price discriminations among customers competing with each other (R. 2255)—a finding that under *Morton Salt*

is sufficient to establish a violation of Section 2(a)— the court below ignored the *Morton Salt* rule and substituted a requirement of "causal connection" between the price discriminations and the customers' selling prices. (R. 2313). By this the court obviously meant that there must be direct proof that the discount affected the price of the customers' products. The court below thus reviewed the Commission's order on the very basis rejected in *Morton Salt*, namely, whether the evidence showed that particular customers had in fact been adversely affected by the discriminatory prices.

The evidence that the court relied on—the apparent lack of causal connection between the size of the discount on the controls and the selling price of the burners—was considered by the Commission but not deemed persuasive. The Commission found that competitors paying the higher prices "must either sell at competitive prices and, in so doing, reduce their possible profits by the amounts of discriminations against them or attempt to sell at higher prices than those which the favored customers of respondent charge for oil burners equipped with respondent's automatic temperature controls, with the result of inability to secure business and a reduction in the volume of their sales" (R. 2255). Furthermore, the court below conceded that "some manufacturers did testify that 'the question of price was important * * *

and that they had lost business to certain competitors who enjoyed lower control prices * * *" but thought this testimony outweighed by the evidence of other manufacturers (R. 233). It is apparent from this discussion that the court was substituting its own appraisal of the evidence for that of the Commission.

The court of appeals did not attempt to distinguish the *Morton Salt* situation factually. It merely concluded that here there was no more than a mere possibility of injury to competition. However, in the *Morton Salt* case this Court in effect held as a matter of law that sale to two competitors at substantially different prices of itself permits the Commission to infer the existence of a reasonable possibility of injury to competition.

The decision of the court below treats as a problem requiring weighing of evidence the same kind of a situation in which this Court in *Morton Salt* admonished the Commission for taking evidence. As the Court stated in *Morton Salt* (334 U.S. at 50):

> The Commission here went much further in receiving evidence than the statute requires. It heard testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices * * * The evidence covers about two thousand pages, largely devoted to this single issue—injury to competition.

The Commission hearings in this case (held before the decision in *Morton Salt*) ran intermittently from August 10, 1943, to October 4, 1945, took place in Chicago, Illinois, New York City, and "other cities throughout the country" (R. 2171), and cover more than 1600 pages in the printed record (R. 29-1640). It was precisely a hearing of this magnitude that the rule of *Morton Salt* was intended to obviate. The administrative process would be unduly burdened if the Commission were required to develop a comparable factual record in every Section 2(a) case showing that discriminatory prices had in fact resulted in variations among customers' selling prices. Cf. 334 U.S. at 50.

The fact, adverted to by the court below, that controls are only one element that goes into a burner—albeit the major one—and that burner manufacturers also may obtain discounts from manufacturers of other component parts, affords no basis for distinguishing *Morton Salt*. Competition still is injured. As the Commission stated in its opinion (R. 2275): "Each seller who may have contributed to the aggregate price or cost advantages obtained by the favored burner manufacturers is, in part, responsible for the aggregate competitive result. The fact that the whole competitive effect cannot be traced to respondent alone does not relieve respondent of its share of responsibility * * *." Respondent cannot find exculpation for its injury to competition in similar

injuries that may have been inflicted by other manufacturers. A similar argument was rejected in *Morton Salt* (pp. 48-49).[3]

If the decision below—clearly in conflict with *Morton Salt*—is allowed to stand unreversed, the law in this field will be left in a state of confusion, and the Commission will (at least in the substantial number of cases where review in the Seventh Circuit is a possibility)[4] have to return to the practice of receiving evidence of effects upon competition in an area where this Court has held that such effects may be presumed.

2. Insofar as injury to competition with *competitors* of respondent is concerned, the decision of the court below involves a misapplication of the doctrine of *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. In the *Universal Camera* case this Court merely held that in

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[3] "* * * reference is made to the fact that salt is a small item in most wholesale and retail businesses and in consumers' budgets. For several reasons we cannot accept this contention.

"There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."

[4] Under Section 11 of the Clayton Act, review of Commission orders may be had in any circuit in which the violation was committed or where the violator resides or carries on business. Many cases would thus be subject to review in the Seventh Circuit, and the Commission would have no way of ascertaining in advance of the hearing where a petition to review might be filed.

deciding whether an agency's findings were supported by substantial evidence, the Administrative Procedure Act requires appellate courts to look at the whole record, not just at those portions sustaining the agency action, and that the "whole record" includes the trial examiner's report. However, nothing in that case intimates that the reviewing court is to substitute the examiner's decision for that of the agency whenever it finds that the examiner's recommended findings are themselves supported by substantial or even (in the court's opinion) a preponderance of the evidence. On the contrary, this Court in *Universal Camera* specifically rejected the "notion" that the Board "has power to reverse an examiner's findings only when they are 'clearly erroneous'" (340 U.S. at 492).

Yet the court below appears to have given just such primacy to the examiner's conclusions in reviewing the substantiality of the evidence. The court stated that from its examination of the record as a whole it was "convinced that the findings of the examiner were supported by very substantial evidence" (R. 2311). After summarizing "various undisputed facts" relating to competitor competition, the court said (R. 2312):

> The foregoing facts fully establish the examiner's finding that competitor competition was not injured * * * and they outweigh the facts relied upon by the Commission in reaching the opposite conclusion. And while the findings of an examiner are not "as unassail-

able as a master's " (*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 492), where it appears from the record that they are supported by a preponderance of the evidence, the action of the Commission in rejecting them is arbitrary.

Thus not only did the court below erroneously substitute its judgment for that of the Commission—a practice specifically condemned in the *Universal Camera* case (see 340 U.S. at 488)—but it accorded a significance to the examiner's report that would stifle a regulatory agency's exercise of its own independent judgment on the basis of the entire record before it and its expertise in the field. This criticism is particularly pertinent where, as here, the evidence did not require the Commission to resolve conflicting testimony as to factual matters, in which situation the examiner's opportunity to appraise the credibility of witnesses entitles his recommendations to special weight. The Commission's decisional process in this case involved the drawing of inferences from uncontradicted evidence.[5]

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[5] In Section 2(a) proceedings "The weight to be attributed to the facts proven or stipulated, and the inferences to be drawn from them, are for the Commission to determine, not the courts." *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U. S. 726, 739; cf. *Federal Trade Commission* v. *Staley Manufacturing Co.*, 324 U. S. 746, 760.

The conclusion of the court below that competitor competition was not injured was based primarily on evidence that the business of respondent's competitors had increased during the period in question. There was evidence in the record, however, of losses in business by specific competitors of re-

We submit that the court below has misinterpreted the principles of the *Universal Camera* case both in respect to the weight to be given the examiner's report and the extent to which the court may substitute its judgment for that of the administrative agency when it disagrees with the latter's analysis of the facts. Both of these questions have obvious importance to all administrative agencies and reviewing courts.

CONCLUSION

The decision below is in conflict with one decision of this Court and misapplies another, and involves important questions of federal law. It is respectfully submitted that the petition for certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

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spondent to respondent (e.g., R. 160-1, 839-40). Furthermore, as the Commission pointed out, the tendency of respondent's quantity discount system would be to cause customers to concentrate their purchases in respondent to obtain the lower prices, and thus take business away from respondents competitors (R. 2274).

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